No. 576

FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

GILBERT P. SIMONS, as Executor of the Last Will and Testament of KATE R. SIMONS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered October 24, 1955, affirming the judgment of the United States District Court for the Eastern District of New York entered on the 9th day of June, 1955.

Opinions Below

The opinions of the District Court, filed May 20, 1955, and of the Court below, filed November 10, 1955, are not yet reported and for convenience copies are appended to this petition (pp. 11-15, *infra*).

Grounds on Which Jurisdiction Is Invoked

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is United States Code, Title 28, § 1254(1).

Question Presented for Review

On May 17, 1940, decedent, the donee of a testamentary Power of Appointment, executed a Will (subsequently duly probated) wherein she directed that on her death the property subject to the power should be distributed to named individuals other than herself, her estate, her creditors or the creditors of her estate.

Decedent suffered a stroke in August 1941, and by August 1942 she had become, and until her death in 1949 she remained, without interruption, totally and incurably lacking in testamentary capacity to execute a new will or alter the one she made in 1940 (F. F. 11, Appendix, pp. 13a-14a) so that, in the words of the learned District Judge (Appendix, p. 19a):

> "her testamentary designation coupled with her subsequent incapacity, as a practical matter, had the same effect as a partial release of the power."

THE QUESTION PRESENTED IS: Should the appointed property be included in decedent's gross estate for estate tax purposes under the 1939 Revenue Code, as amended, which, as far as here material, provides that property with respect to which the decedent exercises a general power of appointment shall be includible, but that [Title 26 U. S. C. § 811 (f)]:

> "If before November 1, 1951, * * * a general power of appointment created on or before October 21, 1942, shall have been partially released so that it is no longer a general power of appointment, the subsequent exercise of such power shall not be deemed to be the exercise of a general power of appointment."

The Statute Involved

The statute involved is the Internal Revenue Code of 1939, as amended (26 U.S.C., § 811) which, in so far as here material, reads as follows:

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * * *

(f) [as amended by Sec. 2 of Powers of Appointment Act of 1951, c. 165, 65 Stat. 91] *Powers of Appointment.*—

(1) *Property with respect to which decedent exercises a general power of appointment created on or before October 21, 1942.*—To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent (1) by will or (2) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under subsection (c) or (d); but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof.

If before November 1, 1951, * * * a general power of appointment created on or before October 21, 1942, shall have been partially released so that it is no longer a general power of appointment, the subsequent exercise of such power shall not be deemed to be the exercise of a general power of appointment.

* * * * * *

(3) *Definition of general power of appointment.*—For the purposes of this subsection the term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; * * *."

Statement of the Case

By deed of trust dated April 22, 1931 (Exhibit 1, App., p. 23a) Sidney A. Kirkman, as grantor, conveyed to himself and Kate R. Simons, the decedent, as trustees, 374 shares of common stock of Kirkman Holding Corporation, to hold in trust during the lifetime of decedent, pay the income to Sidney A. Kirkman or alternative income beneficiaries in the event he predeceased decedent, and, upon the death of decedent, to divide and pay over the principal of the trust fund, to the extent provided in the trust agreement,

> "to such person or persons and/or corporation or corporations, and in such proportions and upon such estates, as said Kate R. Simons may by duly executed last will and testament or instrument in the nature thereof, limit and appoint, and to the extent that she shall fail to make any valid appointment thereof, to the executors and administrators, as the case may be, of the estate of said Kate R. Simons * * *."

On May 17, 1940 decedent executed a will, in paragraph Fifth of which she referred to the said power of appointment and provided (Appendix, pp. 7a-11a):

> "In execution of the aforesaid power of appointment, I hereby direct that the property over which I have such power of appointment (hereinafter referred to as 'said property') shall be paid over and/or distributed as follows:"—

and then follow provisions pursuant to which the property subject to the power was bequeathed in fixed proportions

to named individuals, none of whom was the decedent or her estate, or a creditor of either.

In August 1941, when decedent was 81 years old, she was stricken with a cerebral hemorrhage. Early in the summer of 1942 she suffered another, which completely deprived her of every normal bodily function. As a result of this stroke, and commencing not later than August 1942, decedent could not use her limbs or her hands; she was unable to read, write, talk or communicate her thoughts or desires in any way; she was "just like a dumb person," and had to be handled and treated "like a baby" by nurses in constant attendance, night and day. This condition was incurable and continued without interruption until her death some seven years later.

Decedent was without testamentary capacity to alter the aforesaid 1940 instrument, which ultimately was probated as her will, from, at the latest, the time of her second stroke in August 1942 until her death in August 1949.

Basis for Federal Jurisdiction in the District Court

The basis for Federal jurisdiction in the District Court is believed to be U. S. C. Title 28, § 1346.

Argument Amplifying the Reasons Relied on for the Writ

The Court below has decided an important question of Federal law which is of very wide application, and which has not been, but, we submit, should be, settled by this Court.

The statute, quoted above (pp. 3-4), defines a testamentary "general power of appointment" as one

> "which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate"

and provides that where a pre-1942 general power of appointment

> "shall have been partially released so that it is no longer a general power of appointment, the subsequent exercise of such power shall not be deemed to be the exercise of a general power of appointment."

Thus the question is: Did such a "partial release" take place here?

The learned Courts below, though they held that what occurred here

> "as a practical matter had the same effect as a partial release,"

decided that it should not be given that effect because "the statute makes no provisions for such a contingency"—citing only the statement in *New Colonial* v. *Helvering*, 292 U. S. 435 that "exemptions" for income tax purposes "should only be allowed where there is a clear provision therefor."

Since all income is includible for income tax purposes unless specifically made deductible, and the deductible items are expressly described, it follows, of course, that no deduction may be taken for income tax purposes unless the statute make clear provision therefor.

That test, however, is inapplicable here because the provisions of the Code relating to the release of powers of appointment, unlike the provisions dealing with income tax deductions, do not define or describe what shall constitute a "partial release" of a general power, or how such a release shall be affected—other than that the power shall "no longer" be "exercisable" in favor of the donee, his estate, his creditors or the creditors of his estate.

In the case of a testamentary power, the word "exercisable" refers, not to the scope of the power as granted by the instrument creating the power, but to the extent to which the donee may lawfully exercise the power *at the time*

of his death. Consequently, a testamentary general power of appointment is "partially released" if at any time after the creation of the power, and continuing up to the time of the donee's death, the donee "no longer" has the right to appoint generally (*Kendrick* v. *Commissioner,* 34 B. T. A. 1040; see also, Ruling of the General Counsel of the Treasury, reported in C. C. H. "Federal Estate and Gift Tax Reporter," Vol. 1, Par. 1600.54, p. 2257).

Nothing in the statute describes or limits the manner in which such incapacity shall be caused. All that matters is that the inability exists at the time of the donee's death.

Hence, we submit, it was error for the learned courts below, by analogizing the statutory test here to the one applicable to income tax "exemptions," to deny partial release consequences to a state of facts which

> "as a practical matter had the same effect as a partial release of the power,"

on the theory that

> "the statute makes no provision for such a contingency."

The Regulations confirm that a general power may be partially released even though there be no express release.

Regulation 105, § 81.24(b) provides:

> "In general, it is assumed that all general powers of appointment are releasable unless the local law on the subject is to the contrary, and it is presumed that the method employed to release the power is effective, unless it is not in accordance with the local law relating specifically to releases or, in the absence of such local law, is not in accordance with the local law relating to similar transactions."

And in Subdivision (b)(2) (iii) of the same Regulation it is provided:

> "A release of a power of appointment need not be formal or express in character."

These provisions of the Regulation emphasize that any concatenation of events, as a result of which a power which was "general" ceases to be one which the donee may exercise in favor of himself, his estate, his creditors or the creditors of his estate, and so remains up to the time of the donee's death, results in a "partial release," provided it is "in accordance with the local law." This proviso was met here: the partial release was effectuated not only "in accordance with local law" but *because* of it.

If the donee cease to be capable of exercising the power generally, the subsequent exercise of the power is nontaxable, even though there be no Regulation or State statute making provision therefor [*District of Columbia* v. *Lloyd*, 160 F. 2d 581, 583-584 (C.A.D.C., 1947); *Leser* v. *Burnet*, 46 F. 2d 756, 761 (C. C. A. 4th, 1931)].

Where a direction for the limited exercise of a power has become irrevocable by reason of the effect of state law, the result is the same as if there had been an express release of any greater power theretofore held. Thus, in *Noble* v. *Rogan, Collector*, 49 Fed. Supp. 370 (D.C.S.D. Cal., 1943), a husband and wife, as Settlors, by agreement dated April 25, 1928, placed property in trust, the income therefrom to be paid to their daughter for life and the corpus to be disposed of on her death.

> "in the same manner as her interest in the respective estates of the Settlors shall be disposed of by their last wills and testaments."

By said agreement, the Settlors reserved the power to modify the trust agreement in various ways, including the right to change the beneficiary. Subsequently, and without executing any modifying agreement, the husband died, and thereafter the wife executed a document by which she

purported to "release" her right to dispose of the corpus by her will. The Government contended that this resulted in a taxable gift to the daughter. The Court rejected that contention: it held that since, under the law of the state of the Settlors' domicile, a modification of the trust agreement would have had to be signed by the husband and wife jointly, his death made the trust agreement irrevocable by operation of law and (p. 372)

> "the instrument executed by [the wife] was void and of no effect as [the wife] had no power to change the terms of the trust agreement dated April 25, 1928."

Just as an express release by the wife of the power to change the beneficiary named in the Trust Agreement was superfluous there, because the death of her husband had effected an irrevocable termination of the power by operation of state law, so here an irrevocable partial release was effected under state law by decedent's testamentary designation coupled with her ensuing incapacity to change it at any time during the seven years ending with her death.

Where the donee of a general power of appointment makes a special appointment in his will, the property which passes is taxable if he retained the ability, up to the time of his death, to change the appointment from a special to a general one: in such a case the donee's failure to make the change is his voluntary choice, and the statute provides that the donee's *ability* to appoint generally—not the use he chooses to make of it—determines taxability [26 U. S. C. §811 (f)(1)]. Where, however, as here, the power to change did not exist at death, the reason for the rule is absent, and it would be contrary to the Congressional intent, as well as the statutory language, to apply it.

If, during her lifetime, decedent had, by a valid writing, irrevocably agreed not to exercise the power in favor of any one other than those named in her Will, there would be no question but that the general power had been partially released, and the subsequent exercise thereof would

not be taxable. Here, as the courts below have held, the same result was effected by operation of law. The reason for, or the cause of, such result is of no consequence: it makes no difference that it was due to an act of God, coupled with the operation of law, rather than to a voluntary release.

WHEREFORE, it is respectfully submitted that this petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit should be granted.

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New York City, N. Y.

Opinion of District Judge Robert A. Inch.

INCH, *Ch. J.*

In this action plaintiff seeks to recover estate taxes amounting to $64,515.89, with interest, alleged to have been illegally, wrongfully and erroneously assessed and collected from plaintiff as Executor of the Last Will and Testament of Kate R. Simons, deceased.

The decedent had a general power of appointment under an *inter vivos* trust created by one Sidney R. Kirkman on April 22, 1931, which had a value at decedent's death of $274,140.33.

On May 17, 1940 decedent executed her last will and testament in which she exercised her power of appointment in favor of certain of her relatives. Decedent died on August 21, 1949 and her will was duly admitted to probate on March 9, 1950.

Plaintiff filed an estate tax return claiming that the property subject to the said power of appointment was not subject to tax, but, in order to avoid the running of interest, paid the tax of $64,515.89 on the property and now brings this action for a refund.

The statute involved herein provides as follows:

Internal Revenue Code of 1939

"Sec. 811 Gross estate

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's interest.* To the extent of the interest therein of the decedent at the time of his death;

* * * * * *

(f) [as amended by Sec. 2 of Powers of Appointment Act of 1951, c. 165, 65 Stat. 91] *Powers of Appointment*

(1) *Property with respect to which decedent exercises a general power of appointment created on or before October 21, 1942.* To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent (1) by will or (2) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under subsection (c) or (d); but the failure to exercise such a power or *the complete release* of such a power shall not be deemed an exercise thereof.

If before November 1, 1951, or within the time limited by paragraph (2) of section 403(d) of the Revenue Act of 1942, as amended, in cases to which such paragraph is applicable, a general power of appointment created on or before October 21, 1942, shall have been *partially released* so that it is no longer a general power of appointment, the subsequent exercise of such power shall not be deemed to be the exercise of a general power of appointment.

* * * * * *

(3) *Definition of general power of appointment.* For the purposes of this subsection the term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate except that * * *." (26 U. S. C. A. Sec. 811.) (Emphasis supplied.)

It is the Government's contention that the decedent had a general power of appointment created prior to October 21, 1942, which she never released in any manner, and which she fully exercised in her will, so that under the above statute the value of the property passing thereunder was properly included in her taxable estate.

At the trial plaintiff proved by more than a fair preponderance of the evidence that the decedent suffered a stroke in August 1941 and by about August 1942 her physical condition had deteriorated to the extent that she was unable to walk, talk, move her hands or limbs or communicate her thoughts to anyone. Thus, the proof warrants a finding that decedent totally lacked testamentary capacity to alter her 1940 will from a date prior to October 21, 1942 until the date of her death.

From this fact plaintiff makes a rather ingenious argument to avoid the imposition of the estate tax on this property. He points out that prior to 1942 a general power of appointment was taxed if the power was exercised and if property passed under the power (Sec. 811(f) of the Int. Rev. Code of 1939 as originally enacted); that the Revenue Act of 1942, enacted October 21, 1942, imposed a tax whether or not the power was exercised and that in order to prevent a retroactive application of the tax to powers created prior to October 21, 1942, Congress specifically provided that the owner of such a power could release it and thereby avoid the tax imposed by the new statute.

Thus, relying on Sec. 811(f) of the Internal Revenue Code of 1939, as amended by the Powers of Appointment Act of 1951, quoted above, plaintiff argues that where a pre-1942 power of appointment has been partially released, so that the holder thereof has no power to exercise the power in favor of himself, his estate, his creditors, or the creditors of his estate, such a power is not a general power of appointment subject to tax. Here, he says, a partial release of the power of appointment was effected by oper-

ation of law because after decedent's "limited" exercise of the power in her will, she was thereafter so physically and mentally incapacitated that it became impossible for her to exercise the power "generally", i.e. in favor of herself, her estate, her creditors or the creditors of her estate. In other words, plaintiff contends that decedent's incapacity had the same effect as if she had made a valid agreement irrevocably releasing her right to exercise the power "generally." It is plaintiff's position that at the time of decedent's death, her power to appoint "generally" did not exist, and the reason for its non-existence is immaterial under the statute, whether the reason for the non-existence was that the power was never conferred, or that it was voluntarily released, or released by operation of law or by act of God.

However, decedent had a general power of appointment which she fully exercised in her will in favor of certain of her relatives. She never attempted to change that designation while she was able, and although it is unfortunate that her physical and mental incapacity precluded her from changing her will after October 21, 1942, so that her testamentary designation coupled with her subsequent incapacity, as a practical matter, had the same effect as a partial release of the power, nevertheless, the statute makes no provision for such a contingency. The statute in effect grants an exemption from tax which, like a tax deduction, depends on "legislative grace" and should only be allowed where there is clear provision therefor. (See: *New Colonial Co.* v. *Helvering,* 292 U. S. 435.) While Congress has specifically provided for the full or partial release of a pre-1942 power of appointment, the court cannot construe the statute as expressly or impliedly granting an exemption in the situation here presented. This is a matter for the legislature.

Accordingly, the Government is entitled to a judgment dismissing the action without costs.

Findings of fact and conclusions of law are being filed simultaneously herewith.

Settle order.

ROBERT A. INCH,
Chief Judge, U. S. District Court.

Opinion of United States Court of Appeals

Per curiam: Affirmed on the opinion of District Judge Inch.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of October one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. J. EDWARD LUMBARD,
Circuit Judges.

GILBERT P. SIMONS, etc.,
Plaintiff-Appellant,

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/S/ A. DANIEL FUSARO,
Clerk.

Office - Supreme Court, U. S.
FILED
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HAROLD B. WILLEY, Clerk

No. 576

United States Court of Appeals

FOR THE SECOND CIRCUIT

Civ. No. 13038

GILBERT P. SIMONS, as Executor of the Last Will and Testament of KATE R. SIMONS,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Respondent.

APPELLANT'S ~~BRIEF AND~~ APPENDIX

On Appeal from the United States District Court for the Eastern District of New York

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UNITED STATES COURT OF APPEALS
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Civ. No. 13038

GILBERT P. SIMONS, as Executor of the Last Will and Testament of KATE R. SIMONS,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Respondent.

Statement Under Rule 15(b).

Plaintiff instituted the action by the filing of the complaint on November 12, 1952. Defendant interposed an Answer on February 13, 1953. A note of issue was filed on March 18, 1953. The matter was tried on April 14, 1955, before the Hon. Robert A. Inch, U. S. D. J. On May 20, 1955, the Court filed Findings of Fact, Conclusions of Law and an Opinion which held the defendant entitled to judgment dismissing the complaint. Pursuant to said opinion a judgment was filed on June 9, 1955, dismissing the complaint. A Notice of Appeal from the judgment dated June 9, 1955 was filed on June 15, 1955.

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Complaint.

(Record pages 67-71)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiff above named by Gallop Climenko & Gould, his attorneys, complaining of the defendant alleges:

FIRST: This claim arises under the Internal Revenue laws of the United States and this Court has jurisdiction
5 under Section 1346, Title 28, United States Code.

SECOND: Kate R. Simons, above named (hereinafter referred to as "decedent"), died a resident of the County of Kings, City and State of New York, in the Eastern District of New York, on August 21, 1949, leaving a Last Will and Testament dated May 17, 1940, which was duly admitted to probate by decree of the Surrogate's Court of Kings County, State of New York, in the Eastern District of New York, dated March 9, 1950, by which decree Gilbert P. Simons, above named, was duly appointed Executor of said Last Will and Testament of decedent, and at all times since then said Gilbert P. Simons has been, and still is, duly acting as such Executor.

THIRD: Heretofore and on or about November 21, 1950,
6 plaintiff duly filed a United States Estate Tax Return for the estate of decedent with the Collector of Internal Revenue for the First District of New York, whose office then was, and still is, within the Eastern District of New York, in Schedule H of which, entitled "Powers of Appointment", plaintiff set forth that decedent had possessed a power of appointment created by a deed of trust executed by Sidney A. Kirkman on April 22, 1931, which power of appointment had a value, at date of decedent's death, of $274,140.33, but which was not included in the gross estate.

FOURTH: Thereafter, and on or about February 5, 1951, plaintiff duly filed an amended United States Estate Tax Return for said decedent with the aforesaid Collector of Internal Revenue for the First District, whose office then was, and still is, within the Eastern District of New York, in Schedule H of which, entitled "Powers of Appointment", plaintiff set forth that decedent possessed the aforesaid power of appointment created by said deed of trust executed by Sidney A. Kirkman, which power of appointment had a value, at date of decedent's death, of $274,140.33; that the Executor, plaintiff herein, maintained that said power of appointment was not includible in the decedent's gross estate; "but in order to avoid the running of interest 8
the Executor has determined to include the power of appointment in the gross estate on this amended return and file a claim for refund of estate taxes paid."

FIFTH: By reason of the foregoing, plaintiff, as such Executor, was obliged, at time of filing said Amended Estate Tax Return, to pay, and did pay, to said Collector of Internal Revenue for the First District of New York, within the Eastern District of New York, and the said Collector of Internal Revenue did collect from plaintiff, as such Executor, the amount of Sixty-three Thousand, Seven Hundred Nineteen and 39/100 ($63,719.39) Dollars, plus Seven Hundred Ninety-six and 50/100 ($796.50) Dollars interest thereon, making a total of Sixty-four Thousand, Five Hundred Fifteen and 89/100 ($64,515.89) Dollars as the United 9
States Estate Tax (plus said interest) on the estate of decedent.

SIXTH: Plaintiff made payment of the aforesaid tax and the interest thereon, as hereinabove alleged, without prejudice to his right to the recovery thereof if it be determined that property passing under said power of appointment is not to be included in the decedent's gross estate for Federal estate tax purposes.

10

SEVENTH: Thereafter and on or about February 12, 1951, a United States Estate Tax was assessed against the estate of decedent in the amount of Sixty-three Thousand, Seven Hundred Nineteen and 39/100 ($63,719.39) Dollars, plus interest in the amount of Seven Hundred Ninety-six and 50/100 ($796.50) Dollars, making a total of Sixty-four Thousand, Five Hundred Fifteen and 89x100 ($64,515.89) Dollars, against which plaintiff, as such Executor, was given credit for the payment alleged in Paragraph "Fifth" hereof.

EIGHTH: Upon information and belief, the aforesaid tax was so assessed on the ground that the aforesaid power of
11 appointment created by said deed of trust executed by Sidney A. Kirkman on April 22, 1931, and exercised by decedent in her aforesaid Will dated May 17, 1940, was a general power of appointment.

NINTH: Upon information and belief, by her Last Will and Testament, executed May 17, 1940, and duly admitted to probate on March 9, 1950, as hereinabove set forth, decedent exercised said power of appointment in favor only of certain named and specified individuals other than herself, her creditors or her estate.

TENTH: Upon information and belief, from a date prior to October 21, 1942, until and including the time of decedent's death on August 21, 1949, decedent was, and at all
12 times remained, without testamentary capacity to execute a new Last Will and Testament or to execute a codicil to any pre-existing Will and Testament, or to change any portion of the said Last Will and Testament executed by her on May 17, 1940.

ELEVENTH: On or about February 27, 1951, plaintiff, as such Executor, duly filed a claim for refund of said tax and interest so paid, with the Collector of Internal Revenue for the First District of New York at his office in the Bor-

ough of Brooklyn, City and State of New York, Eastern District of New York, which said claim for refund was denied by the Commissioner of Internal Revenue on or about June 11, 1952.

TWELFTH: By reason of the foregoing plaintiff, as such Executor, was illegally, wrongfully and erroneously required to pay to said Collector of Internal Revenue for the First District of New York, and said Collector of Internal Revenue for the First District of New York illegally, erroneously and wrongfully collected from plaintiff, as such Executor, said sum of Sixty-four Thousand, Five Hundred Fifteen and 89/100 ($64,515.89) Dollars.

14

THIRTEENTH: The said Collector of Internal Revenue for the First District of New York, by whom the aforesaid tax and interest were so collected, is not in office as Collector of Internal Revenue or as Director of Internal Revenue at the time of the commencement of this action.

WHEREFORE, plaintiff demands judgment against defendant for Sixty-four Thousand, Five Hundred Fifteen and 89/100 ($64,515.89) Dollars, with interest from February 5, 1951, together with the costs and disbursements of this action.

Dated: New York, N. Y., November 7, 1952.

GALLOP CLIMENKO & GOULD,

15

By (sgd.) M. R. GALLOP,
M. ROBERT GALLOP,
A Member of the Firm,
Attorneys for Plaintiffs,
Office and P. O. Address,
30 Broad Street,
Borough of Manhattan,
City of New York (4).

16

Answer.

(Record page 73)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

United States of America, the defendant above-named, by Frank J. Parker, United States Attorney for the Eastern District of New York, for its answer to the complaint herein respectfully alleges and shows:

17 1.

Admits each and every allegation contained in paragraphs First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh and Thirteenth of the complaint.

2.

That defendant is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs Ninth and Tenth of the complaint.

3.

Denies each and every allegation contained in paragraph Twelfth of the complaint.

18 WHEREFORE, defendant demands judgment dismissing the complaint.

FRANK J. PARKER,
United States Attorney,
Eastern District of New York,
Attorney for Defendant,
271 Washington Street,
Brooklyn, New York.

Relevant Provisions of the Deed of Trust Dated April 22, 1931, by Sidney A. Kirkman and Kate R. Simons as Trustees Referred to in Paragraph "Third" of Complaint.

* * * * * *

"* * * upon the death of said Kate R. Simons, to divide and pay over the principal of said trust fund * * * to such person or persons and/or corporation or corporations, and in such proportions and upon such estates, as said Kate R. Simons may by duly executed last will and testament or instrument in the nature thereof, limit and appoint * * *."

* * * * * *

Relevant Provisions of the Last Will and Testament of Kate R. Simons Dated May 17, 1940, Referred to in Paragraph "Second" of Complaint.

* * * * * *

FIFTH: By an agreement dated April 22, 1931, between Mr. Sidney A. Kirkman, as party of the first part, and myself and Mr. Sidney A. Kirkman, as parties of the second part, it is provided that certain property in said agreement described shall be paid over and delivered upon my death to such person or persons and/or corporation or corporations and in such proportions and upon such estates as I may, by duly executed Last Will and Testament or instrument in the nature thereof, limit and appoint, and, to the extent that I shall fail to make any valid appointment thereof, to the executors or administrators, as the case may be, of my estate. In execution of the aforesaid power of appointment, I hereby direct that the property over which I have such power of appointment (hereinafter referred to as "said property") shall be paid over and/or distributed as follows:

22 *Relevant Provisions of the Last Will and Testament of Kate R. Simons, dated May 17, 1940.*

(a) One-fifth of said property shall, immediately, upon my death, be delivered and/or paid over to GILBERT P. SIMONS, son of my brother ORRIN W. SIMONS, absolutely and forever; but if said GILBERT P. SIMONS shall have predeceased me leaving issue me surviving then upon my death said one-fifth of said property shall immediately be paid over and/or delivered to such surviving issue of GILBERT P. SIMONS, absolutely and forever, such issue, if there be more than one of them, to take in equal proportions. If said GILBERT P. SIMONS shall predecease me leaving no issue me surviving, said one-fifth of said property shall,
23 immediately on my death, be paid over and/or delivered, in equal parts, to such of RACHEL K. SIMONS, KATHERINE R. SIMONS and ORRIN H. SIMONS, children of my brother JAMES SIMONS, as shall be then alive; but if any of said RACHEL K. SIMONS, KATHERINE R. SIMONS and ORRIN H. SIMONS, children of my brother, JAMES SIMONS, shall theretofore have died leaving issue me surviving, such surviving issue shall take, in equal proportions, the share his, her or their parent would have taken if then living.

(b) (1) If my sister, SARAH K. TAYLOR, shall survive me, the remaining four-fifths of said property shall be delivered and/or paid over to my Trustees hereinafter named, IN TRUST NEVERTHELESS, to invest, reinvest and keep the same invested during the lifetime of my sister, SARAH
24 K. TAYLOR, and to pay the rents, issues, income and profits therefrom not less frequently than quarter-annually during the lifetime of my sister, SARAH K. TAYLOR, as follows: to MILDRED I. CUNNINGHAM, in recognition of her faithful service to me, a sum computed at the rate of Thirty Dollars ($30.00) per week; and the remainder of said rents, issues, income and profits to the following persons in the following proportions: one-fifth thereof to SARAH K. TAYLOR; one-fifth thereof to RACHEL K. SIMONS and KATHERINE R.

Relevant Provisions of the Last Will and Testament of Kate R. Simons, dated May 17, 1940.

SIMONS in equal shares and the whole thereof to the survivor of them; one-fifth thereof to ORRIN H. SIMONS, and the remaining two-fifths thereof to GILBERT P. SIMONS.

In the event that my sister, SARAH K. TAYLOR, shall survive me and said MILDRED I. CUNNINGHAM shall predecease me, then, from the time of my death, or, if SARAH K. TAYLOR shall survive me and said MILDRED I. CUNNINGHAM shall survive me but predecease my sister, SARAH K. TAYLOR, then from the time of the death of said MILDRED I. CUNNINGHAM, the whole or the rents, issues, income and profits from said remaining four-fifths of said property shall be divided and paid over during the life of SARAH K. TAYLOR, as follows: one-fifth thereof to SARAH K. TAYLOR; one-fifth thereof to RACHEL K. SIMONS and KATHERINE R. SIMONS in equal shares and the whole thereof to the survivor of them; one-fifth thereof to ORRIN H. SIMONS, and the remaining two-fifths thereof to GILBERT P. SIMONS.

If any of the said RACHEL K. SIMONS, KATHERINE R. SIMONS, ORRIN H. SIMONS and GILBERT P. SIMONS shall predecease SARAH K. TAYLOR, leaving issue living during the lifetime of SARAH K. TAYLOR, the issue of the one so dying, and the survivor or survivors of such issue, shall, as long as such issue shall live during the lifetime of SARAH K. TAYLOR, take the portion of such rents, issues, income and profits which his, or her or their parent would have taken if living, and upon the death, during the lifetime of SARAH K. TAYLOR, of the last of such issue of any such parent, the portion of the rents, issues, income and profits which such parent would have taken, if living, shall, during the remainder of the life of SARAH K. TAYLOR, be paid over in equal shares to the survivors of said SARAH K. TAYLOR, RACHEL K. SIMONS, KATHERINE R. SIMONS, ORRIN H. SIMONS and GILBERT P. SIMONS, and the issue of any of them who shall theretofore have died leaving issue then surviving, such surviving issue

28 *Relevant Provisions of the Last Will and Testament of Kate R. Simons, dated May 17, 1940.*

to take the share which his, her or their parent would have taken, if living; if, however, any of the said RACHEL K. SIMONS, KATHERINE R. SIMONS, ORRIN H. SIMONS and GILBERT P. SIMONS shall predecease SARAH K. TAYLOR leaving no issue living during any part of the lifetime of SARAH K. TAYLOR, the portion of the rents, issues, income and profits which the one so dying would have taken, if living, shall, during the lifetime of SARAH K. TAYLOR, be paid over in equal shares to the survivors of said SARAH K. TAYLOR, RACHEL K. SIMONS, KATHERINE R. SIMONS, ORRIN H. SIMONS and GILBERT P. SIMONS and the issue of any of them who
29 shall theretofore have died leaving issue then surviving, such surviving issue to take the share which his, her or their parent would have taken, if living.

If my sister SARAH K. TAYLOR shall survive me, then, upon her death, my Trustees shall immediately divide and pay over the principal of said four-fifths of said property to the persons to whom, and in the proportions in which, income was, immediately prior to the death of SARAH K. TAYLOR, distributable under the foregoing provisions of this Clause Fifth of this Will, except that, for the purposes of determining to whom, and in what proportions, said distribution shall be made, said MILDRED I. CUNNINGHAM shall be deemed theretofore to have died.

(b) (2) If my sister, SARAH K. TAYLOR, shall predecease
30 me, then, immediately upon my death, the remaining four-fifths of said property shall be divided into four equal parts and paid over and/or delivered as follows: Two of said parts to GILBERT P. SIMONS, or, if he shall theretofore have died leaving issue then surviving, to such issue; one of said parts to ORRIN H. SIMONS, or, if he shall theretofore have died leaving issue then surviving, to such issue; and the remaining part, in equal shares, to RACHEL K. SIMONS and KATHERINE R. SIMONS, or if either of the said RACHEL K.

Relevant Provisions of the Last Will and Testament of Kate R. Simons, dated May 17, 1940. 31

SIMONS and KATHERINE R. SIMONS shall theretofore have died, leaving the other me surviving, the whole of said part shall be paid over and delivered to such survivor.

If SARAH K. TAYLOR shall predecease me, and either or both of the said GILBERT P. SIMONS and ORRIN H. SIMONS shall predecease me leaving no issue me surviving, the share which the one so dying would have taken if living shall be paid over and delivered in equal proportions to the survivors of GILBERT P. SIMONS, ORRIN H. SIMONS, RACHEL K. SIMONS and KATHERINE R. SIMONS, except that if any of them shall have predeceased me leaving issue me surviving, such issue shall take the share his, her or their parent would 32
have taken if living.

If SARAH K. TAYLOR shall predecease me, and both RACHEL K. SIMONS and KATHERINE R. SIMONS shall predecease me, either or both leaving issue me surviving, such issue shall take the share his, her or their parent would have taken if living; but if both so die, neither of them leaving issue me surviving, the share they would have taken, if living, shall be paid over and/or delivered as follows: two-thirds thereof to GILBERT P. SIMONS, if he be living, or, if he shall have predeceased me leaving issue me surviving, to his issue, and the other third thereof to ORRIN H. SIMONS if he be living, or, if he shall have predeceased me leaving issue me surviving, to his issue.

* * * * * * 33

34

Findings of Fact and Conclusions of Law Filed May 20, 1955.

(Record pages 107-110)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

FINDINGS OF FACT

1. Kate R. Simons (hereinafter called "decedent")
35 died a resident of Kings County on August 21, 1949 leaving a will dated May 17, 1940 which was duly admitted to probate by a decree of the Surrogate's Court of Kings County on March 9, 1950. Gilbert P. Simons was duly appointed Executor by said decree and he has been and still is acting as Executor.

2. On or about November 21, 1950 plaintiff filed a United States Estate Tax Return for decedent's estate with the Collector of Internal Revenue for the First District of New York which tax return stated that decedent had possessed a power of appointment created by deed of trust executed by Sidney A. Kirkman on April 22, 1931, valued at decedent's death at $274,140.33, which was not included
36 in the gross estate.

3. On or about February 5, 1951 plaintiff filed an amended tax return stating that said power of appointment was not includible in decedent's gross estate, "but in order to avoid the running of interest the Executor has determined to include the power of appointment in the gross estate on this amended return and file a claim for refund of estate taxes paid."

37

4. On or about February 5, 1951 plaintiff paid to the aforesaid Collector estate taxes of $63,719.39 plus interest of $796.50, or a total of $64,515.89.

5. Plaintiff made said payment without prejudice to his right to recovery thereof if it be determined that said power of appointment is not to be included in decedent's gross estate for federal estate tax purposes.

6. On or about February 12, 1951 an estate tax of $63,719.39 plus interest of $796.50 was assessed against decedent's estate and plaintiff was given credit for the payment made on February 5, 1951.

38

7. The said tax was assessed on the ground that the power of appointment created in 1931 was a general power of appointment exercised by decedent's will.

8. On or about February 27, 1951 plaintiff filed with the said Collector a claim for refund of estate taxes and interest paid in the amount of $64,515.89 which claim was denied by the Commissioner of Internal Revenue on June 11, 1952.

9. The Collector of Internal Revenue who collected the said estate tax and interest was not in office at the commencement of this action.

39

10. Decedent had a general power of appointment under the *inter vivos* trust created by Sidney A. Kirkman on April 22, 1931 which she fully exercised in her will dated May 17, 1940 in favor of certain named individuals other than herself, her estate, her creditors or the creditors of her estate.

11. Decedent suffered a stroke in August 1941 and by about August 1942 her physical condition had deterioriated

to the extent that she was unable to walk, talk, move her hands or limbs or communicate her thoughts to anyone, so that decedent totally lacked testamentary capacity to execute a new will or alter her 1940 will from a date prior to October 21, 1942 until her death on August 21, 1949.

CONCLUSIONS OF LAW

I. This action arises under the Internal Revenue Laws of the United States and this Court has jurisdiction under 28 U. S. C. A. Sec. 1346.

41 II. The property subject to decedent's said power of appointment was includible in decedent's gross estate under Sections 811(a) and 811(f)(1) of the Internal Revenue Code of 1939, as amended by Section 2 of the Powers of Appointment Act of 1951, and the estate tax based thereon, amounting to $64,515.89, was properly assessed and collected.

III. The defendant United States of America is entitled to judgment dismissing this action without costs.

ROBERT A. INCH,
Chief Judge, U. S. District Court.

42

43

Opinion of Hon. Robert A. Inch, Filed May 20, 1955.

(Record pages 111-116)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

APPEARANCES:

GALLOP, CLIMENKO & GOULD, Esqs., Attorneys for Plaintiff: by GEORGE TROSK, Esq., of Counsel.

LEONARD P. MOORE, Esq., United States Attorney, Attorney for Defendant; by FREDERIC G. RITA, Esq., Special Assistant to the Attorney General, and ELLIOTT KAHANER, Esq., Assistant U. S. Attorney, of Counsel. 44

INCH, *Ch. J.*

In this action plaintiff seeks to recover estate taxes amounting to $64,515.89, with interest, alleged to have been illegally, wrongfully and erroneously assessed and collected from plaintiff as Executor of the Last Will and Testament of Kate R. Simons, deceased.

The decedent had a general power of appointment under an *inter vivos* trust created by one Sidney R. Kirkman on April 22, 1931, which had a value at decedent's death of $274,140.33. 45

On May 17, 1940 decedent executed her last will and testament in which she exercised her power of appointment in favor of certain of her relatives. Decedent died on August 21, 1949 and her will was duly admitted to probate on March 9, 1950.

Plaintiff filed an estate tax return claiming that the property subject to the said power of appointment was not sub-

to the extent that she was unable to walk, talk, move her hands or limbs or communicate her thoughts to anyone, so that decedent totally lacked testamentary capacity to execute a new will or alter her 1940 will from a date prior to October 21, 1942 until her death on August 21, 1949.

CONCLUSIONS OF LAW

I. This action arises under the Internal Revenue Laws of the United States and this Court has jurisdiction under 28 U. S. C. A. Sec. 1346.

41 II. The property subject to decedent's said power of appointment was includible in decedent's gross estate under Sections 811(a) and 811(f)(1) of the Internal Revenue Code of 1939, as amended by Section 2 of the Powers of Appointment Act of 1951, and the estate tax based thereon, amounting to $64,515.89, was properly assessed and collected.

III. The defendant United States of America is entitled to judgment dismissing this action without costs.

ROBERT A. INCH,
Chief Judge, U. S. District Court.

42

43

Opinion of Hon. Robert A. Inch, Filed May 20, 1955.

(Record pages 111-116)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

APPEARANCES:

GALLOP, CLIMENKO & GOULD, Esqs., Attorneys for Plaintiff; by GEORGE TROSK, Esq., of Counsel.

LEONARD P. MOORE, Esq., United States Attorney, Attorney for Defendant; by FREDERIC G. RITA, Esq., Special Assistant to the Attorney General, and ELLIOTT KAHANER, Esq., Assistant U. S. Attorney, of Counsel. 44

INCH, *Ch. J.*

In this action plaintiff seeks to recover estate taxes amounting to $64,515.83, with interest, alleged to have been illegally, wrongfully and erroneously assessed and collected from plaintiff as Executor of the Last Will and Testament of Kate R. Simons, deceased.

The decedent had a general power of appointment under an *inter vivos* trust created by one Sidney R. Kirkman on April 22, 1931, which had a value at decedent's death of $274,140.33. 45

On May 17, 1940 decedent executed her last will and testament in which she exercised her power of appointment in favor of certain of her relatives. Decedent died on August 21, 1949 and her will was duly admitted to probate on March 9, 1950.

Plaintiff filed an estate tax return claiming that the property subject to the said power of appointment was not sub-

ject to tax, but, in order to avoid the running of interest, paid the tax of $64,515.89 on the property and now brings this action for a refund.

The statute involved herein provides as follows:

Internal Revenue Code of 1939

"Sec. 811 Gross estate

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

47

(a) *Decedent's interest.* To the extent of the interest therein of the decedent at the time of his death;

* * * * * *

(f) [as amended by Sec. 2 of Powers of Appointment Act of 1951, c. 165, 65 Stat. 91] *Powers of Appointment*

(1) *Property with respect to which decedent exercises a general power of appointment created on or before October 21, 1942.* To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent (1) by will or (2) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under subsection (c) or (d); but the failure to exercise such a power or *the complete release* of such a power shall not be deemed an exercise thereof.

48

If before November 1, 1951, or within the time limited by paragraph (2) of section 403(d) of the Revenue Act of 1942, as amended, in cases to which

such paragraph is applicable, a general power of appointment created on or before October 21, 1942, shall have been *partially released* so that it is no longer a general power of appointment, the subsequent exercise of such power shall not be deemed to be the exercise of a general power of appointment.

* * * * * *

(3) *Definition of general power of appointment.* For the purposes of this subsection the term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate except that * * *." (26 U. S. C. A. Sec. 811.) (Emphasis supplied.) 50

It is the Government's contention that the decedent had a general power of appointment created prior to October 21, 1942, which she never released in any manner, and which she fully exercised in her will, so that under the above statute the value of the property passing thereunder was properly included in her taxable estate.

At the trial plaintiff proved by more than a fair preponderance of the evidence that the decedent suffered a stroke in August 1941 and by about August 1942 her physical condition had deteriorated to the extent that she was unable to walk, talk, move her hands or limbs or communicate her thoughts to anyone. Thus, the proof warrants a finding that decedent totally lacked testamentary capacity 51 to alter her 1940 will from a date prior to October 21, 1942 until the date of her death.

From this fact plaintiff makes a rather ingenious argument to avoid the imposition of the estate tax on this property. He points out that prior to 1942 a general power of appointment was taxed if the power was exercised and if property passed under the power (Sec. 811(f) of the Int. Rev. Code of 1939 as originally enacted): that the Revenue

Act of 1942, enacted October 21, 1942, imposed a tax whether or not the power was exercised and that in order to prevent a retroactive application of the tax to powers created prior to October 21, 1942, Congress specifically provided that the owner of such a power could release it and thereby avoid the tax imposed by the new statute.

Thus, relying on Sec. 811(f) of the Internal Revenue Code of 1939, as amended by the Powers of Appointment Act of 1951, quoted above, plaintiff argues that where a pre-1942 power of appointment has been partially released, so that the holder thereof has no power to exercise the power in favor of himself, his estate, his creditors, or the
53 creditors of his estate, such a power is not a general power of appointment subject to tax. Here, he says, a partial release of the power of appointment was effected by operation of law because after decedent's "limited" exercise of the power in her will, she was thereafter so physically and mentally incapacitated that it became impossible for her to exercise the power "generally", i.e. in favor of herself, her estate, her creditors or the creditors of her estate. In other words, plaintiff contends that decedent's incapacity had the same effect as if she had made a valid agreement irrevocably releasing her right to exercise the power "generally." It is plaintiff's position that at the time of decedent's death, her power to appoint "generally" did not exist, and the reason for its non-existence is immaterial
54 under the statute, whether the reason for the non-existence was that the power was never conferred, or that it was voluntarily released, or released by operation of law or by act of God.

However, decedent had a general power of appointment which she fully exercised in her will in favor of certain of her relatives. She never attempted to change that designation while she was able, and although it is unfortunate that her physical and mental incapacity precluded her from

changing her will after October 21, 1942, so that her testamentary designation coupled with her subsequent incapacity, as a practical matter, had the same effect as a partial release of the power, nevertheless, the statute makes no provision for such a contingency. The statute in effect grants an exemption from tax which, like a tax deduction, depends on "legislative grace" and should only be allowed where there is clear provision therefor. (See: *New Colonial Co.* v. *Helvering*, 292 U. S. 435.) While Congress has specifically provided for the full or partial release of a pre-1942 power of appointment, the court cannot construe the statute as expressly or impliedly granting an exemption in the situation here presented. This is a matter for the 56
legislature.

Accordingly, the Government is entitled to a judgment dismissing the action without costs.

Findings of fact and conclusions of law are being filed simultaneously herewith.

Settle order.

ROBERT A. INCH,
Chief Judge, U. S. District Court.

57

58

Judgment Appealed From Dated June 9, 1955.

(Record page 117)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE.]

The issues in the above entitled action having duly come on to be tried before the Honorable Robert A. Inch, Chief Judge, United States District Court for the Eastern District of New York, without a jury, on April 14th, 1955,
59 and the Court having duly rendered its decision in favor of the defendant and against the plaintiff herein, and having made its findings of fact and conclusions of law awarding the defendant herein judgment on the merits,

Now, on motion of Leonard P. Moore, United States Attorney for the Eastern District of New York, attorney for defendant, it is

ORDERED, ADJUDGED AND DECREED that the defendant, United States of America, have judgment upon the issues of this action against the plaintiff dismissing the complaint without costs.

Dated: June 9th, 1955.

60

ROBERT A. INCH,
United States District Judge.

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APPENDIX

Exhibit 1

[Tr.]

* * * and upon the death of said Kate R. Simons, to divide and pay over the principal of the said trust fund, to the extent provided in paragraph FIRST hereof, to such person or persons and/or corporation or corporations, and in such proportions and upon such estates, as said Kate R. Simons may by duly executed last will and testament or instrument in the nature thereof, limit and appoint, and to the extent that she shall fail to make any valid appointment thereof, to the executors or administrators, as the case may be, of the estate of said Kate R. Simons, and to divide and pay over the balance thereof, if any, as in paragraph FIRST provided.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1958 959915 117

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 82 - October Term, 1955.

(Argued October 6, 1955 Decided October 24, 1955.)

Docket No. 23720

GILBERT P. SIMONS, as Executor of the Last Will and Testament of KATE R. SIMONS,

Plaintiff-Appellant,

-v.-

UNITED STATES OF AMERICA,

Defendant-Respondent.

BEFORE:

CLARK, Chief Judge, and
MEDINA and LUMBARD, Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York, Robert A. Inch, Judge.

Plaintiff appeals from a judgment dismissing on the merits his action to recover certain estate taxes paid by him under protest as executor of the will of KATE R. SIMONS.

GEORGE TROSK, New York City (Gallop, Climenko & Gould and Lester J. Tanner, New York City, on the brief), for plaintiff-appellant.

FREDERICK G. RITA, Atty., Dept. of Justice, Washington, D. C. (H. Brian Holland, Asst. Atty. Gen., and Ellis N. Slack and A. F. Prescott, Attys., Dept. of Justice, Washington, D. C., and Leonard P. Moore, U. S. Atty. for the Eastern Dist. of N. Y., and Elliott Kahaner, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for defendant-appellee.

Per Curiam:

Affirmed on the opinion of District Judge Inch.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of October one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK, Chief Judge,
HON. HAROLD R. MEDINA,
HON. J. EDWARD LUMBARD,
Circuit Judges.

- - - - - - - - - - - - - - - - - -x

Gilbert F. Simons, etc.,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Appellee.

- - - - - - - - - - - - - - - - - -x

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO

Clerk

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

Gilbert P Simons, Etc.,
Plaintiff-Appellant,

v.

United States,
Defendant-Appellee.

JUDGMENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED OCT. 24, 1955
A. DANIEL FUSARO, CLERK.

UNITED STATES OF AMERICA

Southern District of New York

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1a to 27a, inclusive, contain a true and complete transcript of printed portions of the record and proceedings had in said Court, in the case of

Gilbert P. Simons, as Executor of the Last Will and Testament of Kate R. Simons,
Plaintiff-Appellant,

against

United States of America,
Defendant-Appellee,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of November in the year of our Lord one thousand nine hundred and fifty-five, and of the Independence of the said United States the one hundred and eightieth.

(Seal)

/s/ A. Daniel Fusaro
Clerk.

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370476—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 576

GILBERT P. SIMONS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF KATE R. SIMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. 11–15) is not reported. The opinion of the Court of Appeals (Pet. 15) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1955 (Pet. 16). The petition for certiorari was filed on December 16, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Where the donee of a power of appointment exercised the power by will in favor of others than herself, her estate, her creditors or the creditors of her estate, and then became wholly incompetent and without testamentary capacity to alter or revoke that will, was this exercise of the power a partial release of it so as to make the property subject to the power exempt from estate taxes under the Powers of Appointment Act of 1951?

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (f) [as amended by Sec. 2 of Powers of Appointment Act of 1951, c. 165, 65 Stat. 91] *Powers of Appointment.*—
>
> (1) *Property with respect to which decedent exercises a general power of appointment created on or before October 21, 1942.*—To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent (1) by will or

(2) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under subsection (c) or (d); but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof.

If before November 1, 1951, or within the time limited by paragraph (2) of section 403 (d) of the Revenue Act of 1942, as amended, in cases to which such paragraph is applicable, a general power of appointment created on or before October 21, 1942, shall have been partially released so that it is no longer a general power of appointment, the subsequent exercise of such power shall not be deemed to be the exercise of a general power of appointment.

* * * * *

(3) *Definition of general power of appointment.*—For the purposes of this subsection the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

* * * * *

[26 U. S. C. 1952 ed., Sec. 811.]

STATEMENT

The District Court, after trial without a jury, found the facts as follows:

Kate R. Simons, the decedent, died a resident of Kings County, New York, on August 21, 1949, leaving a last will and testament dated May 17, 1940, which was duly admitted to probate by the Surrogate's Court of Kings County on March 9, 1950, and the taxpayer was duly appointed and qualified as executor. (R. 12a, Finding 1.)*

In his estate tax return the taxpayer stated that decedent had possessed a power of appointment created by deed of trust dated April 22, 1931, the property subject to which was valued at $274,140.33, but was not included in the decedent's gross estate. (R. 12a, Finding 2.)

Subsequently, taxpayer filed an amended return repeating that the property subject to the power was not includible in the decedent's gross estate but that in order to save interest he had decided to include this property in the amended return and file a claim for refund for the resulting tax. (R. 12a, Finding 3.)

The resulting tax amounted to $64,515.89, including interest which the taxpayer paid. He then filed a claim for refund which was rejected by the Commissioner. (R. 13a, Findings 4–8.)

The decedent by her last will and testament

* Record references are to the Appendix to petitioner's brief in the Court of Appeals.

fully exercised the power of appointment given her by the trust instrument of April 22, 1931, in favor of others than herself, her estate, her creditors or the creditors of her estate. In 1941, the decedent suffered a stroke and, by August 1942, her condition had deteriorated so that she totally lacked testamentary capacity to execute a new will or alter her 1940 will and she remained in this condition until her death on August 21, 1949. (R. 13a–14a, Finding 10, 11.)

Upon these findings of fact, the District Court concluded that the property subject to the decedent's power of appointment was includible in her gross estate under both subsections (a) and (f) (1) of Section 811 of the Internal Revenue Code of 1939, as amended by Section 2 of the Powers of Appointment Act of 1951, c. 165, 65 Stat. 91, *supra,* pp. 2–3. (R. 14a.)

The District Court thereupon entered judgment (R. 20a) dismissing the complaint. The Court of Appeals for the Second Circuit affirmed upon the opinion of the District Judge. (Pet. 16.)

ARGUMENT

Section 811 (f) (3) of the Internal Revenue Code of 1939, *supra,* p. 3, defines a general power of appointment as one which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. The language creating the power of appointment (Ex. 1) here involved is as follows:

> * * * and upon the death of said Kate R. Simons, to divide and pay over the principal of the said trust fund, to the extent provided in paragraph FIRST hereof, to such person or persons and/or corporation or corporations, and in such proportions and upon such estates, as said Kate R. Simons may by duly executed last will and testament or instrument in the nature thereof, limit and appoint, and to the extent that she shall fail to make any valid appointment thereof, to the executors or administrators, as the case may be, of the estate of said Kate R. Simons, and to divide and pay over the balance thereof, if any, as in paragraph FIRST provided.

That the power thus created is a general power squarely within the definition of the statute is beyond dispute.

This power was fully exercised by the decedent in her last will and testament in which she appointed the property to numerous relatives. *Wilson* v. *Kraemer,* 190 F. 2d 341 (C. A. 2d), certiorari denied, 342 U. S. 859; *Guaranty Trust Co. of New York* v. *Johnson,* 165 F. 2d 298 (C. A. 2d). The disposition made under the power is quite different from that which would have been made in default of its exercise, for if the decedent had failed to exercise the power the property subject to it would have passed to her estate. In *Guaranty Trust Co. of New York* v. *Johnson, supra,* the court said (p. 300):

> The test of includibility under the appellants' definitions of "exercise," as they themselves have pointed out, is whether the decedent made a disposition of the appointive property different from that provided by the trust instrument in default of the exercise of the power. That she made such a disposition is clear, and that the trust corpus was actually distributed to the takers in default immaterial. The decedent, therefore, clearly exercised her power within the meaning of Sec. 403 (d) (3) and the value of the trust corpus was properly included in her gross estate.

Nevertheless, the taxpayer argues that since the appointment made by the decedent in her 1940 will was in favor of others than herself, her estate, her creditors or the creditors of her estate, and since she was afterward without testamentary capacity to alter or revoke the will by which she exercised the power, this 1940 exercise of the power worked a partial release of it under the second paragraph of Section 811 (f) (1), *supra*, p. 3, and therefore, under that section, the property subject to the power was not taxable.

The basic vice of this argument is that the power, at all times after the execution of the decedent's last will, was in existence until her death and the decedent could have exercised it in any manner she pleased, if her testamentary capacity were restored. The decedent's incapacity was unfortunate but the statute makes no provision

to cover the situation and, since the statute relied upon is one in effect granting an exemption from tax, it is to be in this instance construed according to its terms. *New Colonial Co.* v. *Helvering,* 292 U. S. 435. Petitioner attempts to escape the terms of the statute by contending that the later lack of ability to exercise the power is the equivalent of a release of the power. But when the decedent exercised the power by her last will and testament it was with the intent to *exercise* it and not to *release* it. That the decedent was unable because of her disability to take advantage of the provisions of the relief statute does not transform her inaction, after an exercise of the power, into a release of the power. The fact is that the case falls squarely within the terms of the first paragraph of Section 811 (f) (1) and does not meet those of the second paragraph.

The cases cited by the petitioner do not support his contention. *District of Columbia* v. *Lloyd,* 160 F. 2d 581 (C. A. D. C.), and *Leser* v. *Burnet,* 46 F. 2d 756, 761 (C. A. 4th), simply hold that a power of appointment may be released by an appropriate instrument. *Noble* v. *Rogan,* 49 F. Supp. 370 (S. D. Cal.), holds no more than that where settlors of a trust have reserved the power to modify the trust, by joint action, an attempt at modification by one of the parties after the death of the other is ineffectual.

CONCLUSION

The decision below is correct. It is not in conflict with any decision of this Court or of any other Court of Appeals. The question involved is not of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

(Italics ours.)

The Government's brief is not responsive to the question presented.

Petitioner does not dispute that the Deed of Trust executed in 1931 conferred a general power of appointment on decedent. But the statute says that a general power may be "partially released," and that, if it is,

> "*the subsequent exercise of such power shall not be deemed to be the exercise of a general power of appointment.*"

Consequently, the question presented is whether or not, in the interim between the creation of the power in 1931 and the exercise of it at decedent's death in 1949, the power had been partially released.

The Government asserts (Brief, p. 7) that the property subject to the power should be included in decedent's taxable estate because, up to the time of her death, decedent could have exercised the power in any manner she pleased *"if her testamentary capacity were restored."* But the fact is that her testamentary capacity was *not,* and continually from a date prior to October 21, 1942, *could not be,* restored. The learned District Court found (Appendix, p. 14-a) that

> *"decedent totally lacked testamentary capacity to execute a new will or alter her 1940 will from a date prior to October 21, 1942 until her death"*

and held that

> "her testamentary designation coupled with her subsequent incapacity, *as a practical matter, had the same effect as a partial release of the power."*

Consequently, in arguing that decedent could have exercised the power in any manner she pleased, "if her testamentary power were restored," the Government assumes an hypothesis which is contrary to the uncontested Finding of Fact and Opinion of the learned District Court.

The Government comments (Brief, p. 6) that the property subject to the power would be includible in decedent's taxable estate if decedent had "failed to exercise the power." The relevance of this comment, in the light of the facts, is hard to see. The undisputed fact is that decedent did *not* default in the exercise of the power. We are, consequently, not concerned with what the result would have been if she *had* defaulted. Decedent exercised the power and the only question is: Had she *partially released* it before it was exercised by her death? If she had, the statute expressly provides that her exercise of the power is not taxable.

The Government argues (Brief, p. 6) that the property subject to the power should be included in decedent's taxable estate because, *as originally created,* "the power is a

general power * * *." But a partial release of a testamentary power *always* relates to a power which, as originally created, was general. It is, accordingly immaterial that the power, as originally created, was general; all that matters is *the extent to which the donee was legally able to exercise the power at the time of her death.* As to that there is no dispute: at the time of her death, and for the seven years immediately preceding her death, decedent was legally and incurably incapable of appointing to herself, her estate or the creditors or either, or to anyone other than the individuals specified by her in the will she executed in 1940.

If decedent, after October 21, 1942, had executed a valid agreement not to change the appointment as made in her 1940 Will, there would have been a partial release of the power, and the subsequent exercise thereof on decedent's death would not have been taxable. As to that there is no dispute. We expected to find in the Government's brief some discussion of the question which naturally arises, i.e.:

> Is not decedent's legal incapacity to change her will as effective for tax purposes as an agreement not to change it?

Petitioner contends that this question should be answered in the affirmative, and in our petition we have cited authorities which we believe support that contention. The Government has failed to even refer to this question, much less to attempt to distinguish the authorities cited by us.

New York, N. Y., January 11, 1956.

Respectfully submitted,

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